Guaranteeing the Right to Defence Counsel in Estonian Criminal Proceedings: the Estonian System of Defence Counsels

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Annotation: The aim of this article is to introduce the system of Estonian defence counsels as well as analyse problems it currently faces. As repeatedly stressed by the European Court of Human Rights, the right to counsel has a prominent status in criminal proceedings. In Estonia, accused persons may either hire counsel or counsel is appointed by the state. The system of state legal aid is operated by the Estonian Bar Association, which appoints counsels among its members, advocates. While only advocates may be appointed counsels, retained counsel may be any person with legal education by permission of the body conducting the proceedings – the court, the investigative body, or the Prosecutor's Office. The Supreme Court of Estonia has emphasised that the body conducting proceedings may withdraw its consent if it turns out that the person does not have enough knowledge about Estonian criminal proceedings or criminal law. In addition, several grounds exist for the removal of both advocates and non-advocates. This is a controversial subject, as an accused has the right to have his chosen counsel by his side throughout the whole proceedings. Also, in state legal aid it is preferable that counsel participates from the very beginning to the end of the proceedings. Yet in some cases the court's failure to remove counsel may violate the accused person's rights. In Estonian law, there are three grounds for removal, two of which – conflict of interests, and ineffectiveness of defence counsel – have a practical meaning.

Keywords: right to counsel, retained counsel, appointed counsel, Estonian criminal proceedings, counsel in Estonian criminal proceedings, removal of counsel, state legal aid, Estonian Bar Association, advocate, ineffective defence

Introduction

The main purpose of this article is to describe the system of defence counsels in Estonian criminal proceedings and to introduce the problems it has faced in previous years as well as the ones it currently faces. Firstly, the article focuses on giving an overview of the existing system to inform the foreign reader on how the right to counsel is guaranteed in practice in Estonia. Secondly, it explains the difficulties the system has faced or is facing and makes some suggestions to overcome these difficulties, which could be interesting for both foreign and local readers. In order to achieve these goals, the article follows the structure described below.

Principles related to the participation of counsels in criminal proceedings are described in the first chapter. As there are two types of defence counsels in Estonian criminal proceedings – retained and appointed (state legal aid) ones – first the difference between these two is described. The conditions of becoming either retained or appointed counsel are described. Secondly, the phases of criminal proceedings during which counsel is allowed to enter the proceedings, and during which his participation is mandatory, are defined. Finally, the overview is given on actions that defence counsels are allowed to or are obliged to perform to serve their purpose as diligent defence counsels. The second chapter focuses on the system of state legal aid in Estonia. Here the system is both described and analysed, as the main difficulties it has faced or is facing are introduced to the reader. The third chapter is devoted to one of the most intriguing subjects related to defence counsels – the removal of counsel from the proceedings, therefore, it discusses the existing grounds for removal of both retained and appointed counsels. It is explained when the courts are allowed to end a continuous relationship between counsel and the accused and order counsel to leave the proceedings.

In every chapter, the relevant Estonian legal acts are mentioned, and judicial practice of the Supreme Court of Estonia (SCE) is explained and discussed. In addition, corresponding case law of the European Court of Human Rights (ECtHR) is also introduced and analysed.

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1. How the right to counsel is guaranteed in Estonia – participation of defence counsels in Estonian criminal proceedings

1.1. Retained and appointed counsels

In Estonia, as in many other legal systems, counsel may participate in criminal proceedings on two bases: on agreement with the client (retained counsel) or on appointment by a competent authority (appointed counsel/state legal aid counsel). Whereas the conclusion of a contract with counsel imposes an obligation on the person being defended to pay for the counsel's services, state appointed counsel provides services to the person being defended free of charge, at least during the proceedings.[2] Only advocates who are members of the Estonian Bar Association[3] may serve as appointed counsels. The circle of potential retained counsels is much wider: both advocates and persons who meet certain educational requirements (i.e. have a Master's degree in the field of law or a qualification equal to it) could serve as one. Due to the fact that one has to pass an exam during which his professional knowledge and personal characteristics are verified before he could become an advocate, no further conditions are set for an advocate to participate as counsel in criminal proceedings. Non-advocates with legal education have to receive permission from the body conducting the proceedings[4] to serve as retained counsel.

Therefore, accused[5] persons' right to choose counsel is limited in Estonia to advocates as appointed counsels, and to advocates and other persons with legal education with permission of the body conducting proceedings as retained counsels. Regulations concerning the qualification of lawyers are permissible according to the case law of the ECtHR[6], as the wishes of the accused can be overridden when 'there are relevant and sufficient grounds for holding that this is necessary in the interests of justice'.[7] Taking into account that counsel serves as a legal advisor to an accused in criminal proceedings, it is reasonable to limit a choice of counsels to persons with legal education. Otherwise, the rights of accused persons might be left unprotected, as counsel with no legal education does not have knowledge and skills to exercise them properly. The market of retained counsels is left open not only to advocates but also to other persons with legal education with an aim to enhance competition. There are around 980 advocates in Estonia at the moment.[8] Most of them are not specialised in criminal law and prefer civil cases. Therefore, if the circle of retained counsels were limited to advocates, accused persons in a country of nearly 1.3 million inhabitants would have a very limited choice of counsels. In addition, there would be a chance that due to workload, advocates would not be able to handle all criminal cases. Non-advocates with legal education and, therefore, presumably adequate knowledge of law serve as an additional option for accused persons. Whether it is reasonable to limit the circle of appointed counsels to the members of the Bar is a whole different subject and will be discussed in the second chapter of this article.

As it was determined, if a non-advocate with legal education wants to enter the proceedings as retained counsel, he always has to have consent from the body conducting proceedings. Even if this person receives consent from the body conducting proceedings, which means that the body conducting proceedings presumes that he is able to act as counsel, it does not mean that if he turns out to have poor knowledge of the law of criminal procedure or criminal law, he is allowed to continue to act as counsel. The SCE has repeatedly held that it is in the competence of the body conducting proceedings to permit such person to enter the proceedings as counsel and, therefore, it is in the body's competence to withdraw the permission. If the body conducting proceedings decides to withdraw its permission, it has to notify the accused and counsel, and give the accused an opportunity to choose another counsel.[9] The SCE has not considered such withdrawal to be a formal grounds for removal of counsel but just revocation of one's consent, which means that it could be done not only by courts, but also by investigative bodies and by the Prosecutor's Office, who are generally not allowed to remove counsels from criminal proceedings. The SCE reasons its position as follows. When the body conducting proceedings gives a person permission to participate in criminal proceedings as counsel, he verifies only whether the person meets qualification requirements or not (unless it has additional information about the person), because the body conducting proceedings usually does not know the person personally and, therefore, has no other facts to use for evaluating his competence. During the proceedings, the body conducting proceedings has a chance to monitor the person's actions and gain knowledge of his skills. Consequently, it is possible that the body conducting proceedings reaches the conclusion that the person lacks knowledge to act as counsel and, therefore, leaves the accused without defence. For that reason, it might be necessary to withdraw permission and give an accused a chance to choose another counsel.[10] Even if the accused rejects, it is important to notice that the right to choose

[2] Upon conviction the person has to remunerate at least part of legal costs. It will be further explained in the second chapter below.

[3] The Estonian Bar Association, founded on the 14th of June 1919, is a self-governing professional association which organises the provision of legal services in private and public interests and protects the professional rights of advocates. Since 1992 the Estonian Bar Association is a member of the International Bar Association (IBA) and since the 1st of May 2004 a full member of a body uniting the bar associations of the member states of the European Union (CCBE).

[4] Bodies conducting proceedings are the courts, the Prosecutors' Office and the investigative bodies.

[5] In this article the term 'accused' is used unless there is a need to make a distinction between the accused and the suspect.

[6] *Mayzit v Russia* App no 63378/00 (ECtHR, 20 January 2005) p 66

[7] *Croissant v Germany* App no 13611/88 (ECtHR, 25 September 1992) p 29

[8] https://www.advokatuur.ee/eng/frontpage> accessed 12 October 2016

[9] Court Ruling of the Criminal Chamber of the Supreme Court, 27 April 2006, court case no 3-1-1-37-06, p 7.3; Court Ruling of the Criminal Chamber of the Supreme Court, 2 August 2010, court case no 3-1-1-61-10, p 7

[10] Court Ruling of the Criminal Chamber of the Supreme Court, 2 August 2010, court case no 3-1-1-61-10, p 8

counsel is not just the accused's personal matter: the court has to make sure that counsel actually fulfils his purpose.[11] As it has also been stated by the ECtHR – the rights that are guaranteed to the accused must not be theoretical or illusory but practical and effective.[12] Therefore, when the state authority notices a counsel's manifest incompetence, it has to intervene.[13] This is a principle the SCE has followed by stating that the body conducting proceedings has the competence to withdraw its previously given consent from a non-advocate to participate as counsel in criminal proceedings.

Although there is no statistical data about how many cases non-advocates serve as counsels in per year in Estonian criminal proceedings, it is assumed that it is in no more than 10% of all criminal cases. Also, there is no information that bodies conducting proceedings have misused their power by arbitrarily not giving consent or withdrawing the consent to participate. The most important case that reached the SCE (case no -1-1-61-10 cited above) involved a foreign non-advocate, who had received the consent from the court to participate as counsel. The consent was withdrawn afterwards due to the fact that although he had legal education, it was received abroad, and he did not have any knowledge on Estonian legislative acts. In that case, the SCE justly concluded that withdrawal was justified as the accused was left without defence due to his counsel's incompetence.

1.2. The stages counsel enters the proceedings

According to the Estonian Code of Criminal Procedure[14] (CCP) § 45 (1), counsel may participate in criminal proceedings from the moment a person acquires the status of a suspect. A suspect is a person who has been detained on suspicion of a criminal offence or a person whom there is sufficient basis to suspect of committing a criminal offence and who is subject to any other procedural act (CCP § 33 (1). As according to § 47 (1) 6) counsel has a right to participate in the investigative activities carried out in the presence of the person being defended during the pre-trial proceeding (incl. interrogation), the judgment of the ECtHR *Salduz v. Turkey*[15] did not change anything in Estonian interrogation rules, unlike in many other European countries.[16] Also, the CCP does not provide any restrictions on the participation of counsel during interrogation of the suspect in pre-trial proceedings, which means that in Estonia the right to have counsel present in pre-trial proceedings is an absolute one, unless the suspect himself agrees to participate without counsel.[17] In that sense, the CCP is in accordance with the EU's Directive 2013/48/EU *on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty*[18] Article 3, which allows the state to temporarily limit the accused person's access to a lawyer in pre-trial proceedings only in exceptional cases.

Participation of counsel in a pre-trial proceeding is mandatory from the presentation of the criminal file for examination to counsel, which means that when the Prosecutor's Office declares a pre-trial proceeding completed, it gives a copy of the criminal file to the defence counsel, who introduces it to the suspect (CCP § 45 (3), § 223 (3) § 224 and § 2241). Therefore, by the time the suspect acquires the status of the accused, participation of counsel is mandatory.[19] In some cases, participation of counsel is mandatory throughout the criminal proceedings (e.g., if at the time of committing the criminal offence the accused was a minor). The fact that the participation of counsel is mandatory means that the accused has no right to defend himself in person. Here the legislator has determined that in court proceedings and in some cases in pre-trial proceedings participation of counsel is required in the interest of justice. As a result, if the accused has not chosen counsel himself, counsel is appointed to him even if he objects. However, if he has chosen counsel it could form a violation of the right to counsel if the counsel of his own choosing were denied access to him and instead the state legal aid counsel were appointed. The ECtHR has concluded that Article 6 of the European Convention on Human Rights[20] was violated in a case, where a minor had retained counsel but at one point he gave up his counsel's services.[21] The message was delivered to counsel by the authorities and counsel was not allowed to meet the accused to verify the accused's true will in the matter.

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[11] *Ibid*, p 10.1

[12] *Artico v Italy* App no 6694/74 (ECtHR, 13 May 1980) p 33

[13] *Kamasinski v Austria* App no 9783/82 (ECtHR, 19 December 1989) p 65

[14] Code of Criminal Procedure *(Kriminaalmenetluse seadustik)*, passed 12 February 2003, entered into force 1 July 2004, last amended 1 September 2016 – RT I, 20.05.2016, 7, available in English at <https://www.riigiteataja.ee/en/eli/531052016002/consolide> accessed 12 October 2016

[15] *Salduz v Turkey* App no 36391/02 (ECtHR, 27 Nov 2008)

[16] Jaan Ginter, Anneli Soo 'The Right of the Suspect to Counsel in Pre-trial Criminal Proceedings, its Content, and the Extent of Application' (2012) 19 Juridica International 170, p 172

[17] *Ibid*, p 178

[18] OJ L 294, 6.11.2013, pp 1–12

[19] According to § 35 (1) of the CCP the accused is a person with regard to whom the Prosecutor's Office has prepared a statement of charges or a person with whom an agreement has been entered in settlement proceedings, which is an Estonian version of plea-bargaining.

[20] European Convention on Human Rights and Fundamental Freedoms – RT II 1996, 11/12, 34 entered into force in respect of Estonia 16 April 1996

After waving the counsel's services, the accused confessed his guilt at the presence of a counsel appointed by the authorities, although he had denied his involvement in the crime before. The ECtHR was not satisfied that the accused's wish to replace counsel of his own choosing could be considered genuine in the circumstances of the case, and therefore concluded an infringement of the accused person's right to defend himself through legal assistance of his own choosing.[22] Although the Court indicated in its judgment that reopening the case would be a proper remedy for the accused, the SCE refused to do it based on an argument that the violation itself occurred in pre-trial stage of the proceedings and did not concern the body of evidence as a whole.[23] This finding has been strongly criticised by the author of this article because most of the evidence against the accused was gathered based on information gained from an unlawful confession, which means that without new evaluation of evidence by the court the violation of the accused person's rights was never cured.[24]

With some exceptions, participation of counsel in an Estonian court proceeding is always mandatory. It is justified by the argument that the accused as a layperson is not able to defend himself effectively. He does not have sufficient understanding of how to exercise his rights as well as knowledge about the laws in force. In addition, he is not objective as he is the one who is accused of committing the crime and his subjectivity may prevent him from making reasonable choices.[25] Estonian law rests on these presumptions and only in rare cases a person is allowed to defend himself in court proceedings. Therefore, the law also strictly determines that if counsel fails to appear in a court session when his participation is mandatory, the court hearing is adjourned (§ 270 (2) of the CCP). If despite everything a court proceeding is conducted without the participation of counsel, which is material violation of criminal procedural law pursuant to § 339 (1) 3) of the CCP, the court judgment is annulled by the higher court and the case is tried again. This applies also to those cases in which participation of counsel has not been mandatory according to CCP § 45 (4), but the court has not determined whether the accused is able to represent his interests himself.[26] According to the judicial practice of the SCE, violation of the accused person's right to counsel in pre-trial proceedings in case participation of counsel is mandatory results in the prohibition of using evidence gathered as a result of this violation against him.[27] However, as it was mentioned above, this applies to the pieces of evidence that are a direct result of the violation, not the evidence gathered based on the information received from the unlawful piece of evidence.[28]

1.3. Counsels' rights and obligations in criminal proceedings

According to the CCP § 16 (2), counsel, as well as the person he is defending, are participants in the proceedings. Counsel is also the party to a court proceeding when the proceedings reach the trial stage (CCP § 17 (1)). In relation to these clauses, the SCE has emphasised that although the duty of counsel is to act in the proceedings in the interests of the accused, at the same time he is not a representative of the accused, but an independent party to a (court) proceeding. Hence, the duty of counsel is to act in the interests of the accused even if the accused does not understand the need to act.[29] It is an extremely important standpoint when it comes to the question of whether counsel has been effective in the proceedings: effectiveness does not always mean that counsel has to follow the accused party's instructions. It might be that the accused as a layperson does not understand the need to act or stay passive as his knowledge on the rules and the course of criminal proceedings is usually rather limited. Nevertheless, in these situations counsel should act in the best interest of the accused, not according to his instructions. In order to retain a confidential and trusting relationship with the accused, counsel should still explain the reason behind his actions and decisions. The common understanding and also an ethical rule of the Bar Association is, however, that although counsel is not bound by the position of his client when rendering a legal opinion on the accusations made against his client, he is bound to the client's position if the client denies the accusations made against him.[30]

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[21] *Martin v Estonia* App no 35985/09 (ECtHR, 30 May 2013)

[22] *Ibid*, p 93

[23] Court Decision of the Criminal Chamber of the Supreme Court, 29 September 2014, court case no 3-1-2-2-14, pp 11-12

[24] Anneli Soo, 'The Right to Choose Counsel in Pre-Trial Stage of Criminal Proceedings and Consequences of its Violation by Example of the Decision of Estonian Supreme Court No. 3-1-2-2-14' (2015) 23 Juridica International pp 124-132

[25] Stefan Trechsel *'Human Rights in Criminal Proceedings'* (Oxford University Press 2005) pp 244-247

[26] Eerik Kergandberg, Priit Pikamäe. *'Code of Criminal Procedure. Commented Edition'* (Kriminaalmenetluse seadustik. Kommenteeritud väljaanne) (Juura 2009) Article 339 commentary 5.3

[27] Court Decision of the Criminal Chamber of the Supreme Court, 29 September 2014, court case no 3-1-2-2-14

[28] Anneli Soo, 'The Right to Choose Counsel in Pre-Trial Stage of Criminal Proceedings and Consequences of its Violation by Example of the Decision of Estonian Supreme Court No. 3-1-2-2-14' (2015) 23 Juridica International 23 Juridica International pp 124-132

[29] Judgment of the Constitutional Review Chamber of the Supreme Court, 18 June 2010, court case no 3-4-1-5-10, p 57, <http://www.nc.ee/?id=1176> accessed 12 October 2016

[30] Code of Conduct of the Estonian Bar Association *(Eesti Advokatuuri Eetikakoodeks)*, adopted on 8 April 1999 by the General Assembly of the Estonian Bar Association, amended on 5 May 2005, 13 March 2007, 21 February 2008 and 1 March 2013 by the General Assembly of the Estonian Bar Association, <https://www.advokatuur.ee/eng/internal-rules/code-of-conduct> accessed 12 October 2016, § 19 (3)

In Estonian criminal proceedings pursuant to § 47 (2) of the CCP, counsel is required to use all means and methods of defence that are not prohibited by law in order to ascertain the facts that either vindicate the person being defended, prove his innocence, or mitigate his punishment, and to provide other legal assistance necessary in a criminal matter to the person being defended. Therefore, it could be concluded that counsel is bound only by law and relevant court practice in the course of fulfilling his duties.[31] In addition, counsel also has to consider instructions given by the accused, unless these instructions are against the accused person's interests, as it was discussed above. Counsel has to follow the lawful orders of courts and other bodies conducting proceedings, but only if these orders concern procedural issues, e.g., deadlines, etc. In any case, these bodies are not allowed to intervene in the counsel's tactical choices. More specific obligations of counsels include an obligation to participate in the proceedings whenever it is compulsory,[32] to have knowledge of the case,[33] and to remain confidential (§ 47 (3) of the CCP). These are the only specific guidelines the CCP provides to counsels. Counsels that are advocates also have to follow the Code of Conduct of the Estonian Bar Association and state legal aid counsels' guidelines, mentioned in the next chapter of this article. From the case law of the CCP, it could be concluded that although non-advocates are not members of the Bar and legal acts of the Bar do not apply to them directly, some general rules for their conduct could still be derived from the Bar's acts, although it is definitely not clear which ones.[34]

In order to fulfil the duty provided for in § 47 (2) of the CCP, counsel has a number of rights, including the right to submit evidence (CCP, § 47 (1) 2)); submit requests and complaints (CCP, § 47 (1) 3)); upon the completion of pre-trial investigation, examine all materials in the criminal file (CCP, § 47 (1) 7)); and confer with the person being defended without the presence of other persons for an unlimited number of times with unlimited duration, unless a different duration of the conference is provided for in the CCP (CCP, § 47 (1) 8)).[35] As a party to a court proceeding, counsel has the right to question the accused (CCP, § 293 (3)) and examine a victim and a witness in a cross-examination (CCP, § 288). If counsel is not allowed to examine a person who gives testimony against a person being defended, it can lead to the violation of the right to a fair trial.[36] The SCE has held that the duties of counsel not only consist of assisting the accused with composing an appeal against the decision or ruling of the court. Counsel also has to ascertain the position of the accused and to file an appeal that considers the accused person's interests and is in accordance with requirements provided by the law.[37] This is in accordance with the above-mentioned standpoints that although counsel is an independent subject in the criminal proceedings, he has to follow the accused party's instructions whenever possible.

When the Prosecutor's Office declares a pre-trial proceeding completed, it gives a copy of the criminal file to the criminal defence counsel and submits the criminal file for examination (CCP § 223 (3)). Pursuant to § 224^1 (1) of the CCP, it is the task of counsel to introduce the criminal file to the person being defended. If the Prosecutor's Office has submitted a criminal file for examination and is convinced that the necessary evidence in the criminal matter has been collected, it prepares the statement of charges and sends it together with the a list of persons to be summoned to a court session at the request of the Prosecutor's Office to the accused and counsel (CCP, § 226 (1), (2) and (3)). After receiving a copy of the statement of charges, counsel prepares the statement of defence and submits it within a time period set by the law (CCP, § 227 (1)). In the statement of defence, counsel has to set out: his position on the statement of charges (CCP, § 227 (3) 1)); evidence that counsel wishes to present and what counsel aims to prove with every single piece of evidence (CCP, §227 (3) 2)); a list of the persons whom counsel requests to be summoned to a court session (CCP, § 227 (3) 3)); and other requests (CCP, § 227 (3) 4)). The purpose of preparing the statement of defence is to guarantee equality of arms and to conduct a court proceeding that is better prepared and, therefore, speedier.[38] If the matter is solved in simplified proceedings, the statement of defence is not composed, as simplified proceedings do not have an adversary nature. However, if the case is conducted in general proceedings, the obligation to prepare the statement of defence is one of the most important obligations that the counsel has as, in general, the court will only admit the evidence listed in the statement. Therefore, if counsel tries to present additional evidence during the court proceeding, the probability is high that the court will not accept these pieces of evidence.[39]

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[31] Anneli Soo, 'An Individual's Right to the Effective Assistance of Counsel Versus the Independence of Counsel: What Can the Estonian Courts Do in Case of Ineffective Assistance of Counsel in Criminal Proceedings?' (2010) 16 Juridica International 252, p 253.

[32] For instance, § 270 (2) of the CCP provides that if a counsel fails to appear in a court session, the court hearing is adjourned.

[33] For instance, § 273 (4) of the CCP provides that if a counsel is not familiar with the criminal matter, the court may adjourn the court session for up to ten days.

[34] Court Decision of the Criminal Chamber of the Supreme Court, 17 March 2010, court case no 3-1-1-7-10 in which the court concluded that a construction worker who does not belong to a professional association still has to follow the professional rules of this association if these rules come from a common knowledge (e.g, rules about how thick a chimney has to be in order to be fireproof).

[35] According to § 34 (2) of the CCP, conference between the accused and his/her counsel may be interrupted for the performance of a procedural act if the conference has lasted for more than one hour.

[36] Meris Sillaots 'Cross-Examination in Estonian Court Proceeding' *(Ristküsitlusest Eesti kriminaalkohtumenetluses)* (2005) 3 Juridica 170, pp 170-171

[37] Court Ruling of the Criminal Chamber of the Supreme Court, 17 February 2010, court case no 3-1-1-9-10, p 9

[38] Explanatory Memorandum to the Act to Amend the Code of the Criminal Procedure and Other Related Acts, 599 SE, 11th Riigikogu, <http://www.riigikogu.ee/?page=eelnou&op=ems2&emshelp=true&eid=793874&u=20130506160423> accessed 12 October 2016

[39] Eerik Kergandberg, Priit Pikamäe. *'Code of Criminal Procedure. Commented Edition'* (Kriminaalmenetluse seadustik. Kommenteeritud väljaanne) (Juura 2009) Article 227 commentaries 2.1. and 3

Counsel has an independent and very important role in Estonian criminal proceedings. By advising the accused as a legal professional, counsel balances the power of the prosecution's side. This, on the one hand, helps to ensure that the rights of the accused are guaranteed throughout the whole proceeding. On the one hand, it also means that the accused is dependant on the competence of a certain counsel. For instance, counsel may give bad advice to the suspect during the interrogation, which might lead to a conviction of the person in latter stages of the criminal proceedings. Counsel might fail to introduce the criminal file to the accused and, therefore, leave the accused uninformed about the development of the case. Counsel might also fail to compose the statement of defence on time, which may cause latter objection of evidence by the court as was discussed above. Or counsel may fail to question a witness adequately, as a result of which necessary information is not revealed. These and many other potential mistakes show how important it is for the accused to have a competent, effectively working counsel by his side. Chapter three of this article gives an overview of what the Estonian courts can do when they notice that counsel is defending the accused inadequately or ineffectively.

2. System of state legal aid in Estonia

2.1. The system operated by the Bar and carried out by its members

As it was already mentioned, only advocates may participate in criminal proceedings as appointed counsels. Appointed counsel enters the criminal proceedings when he is appointed by the Estonian Bar Association at the request of the body conducting proceedings. Before the 1 January 2010, counsel was appointed by the body conducting the proceedings. This caused quite a few problems; for instance, counsel who was convenient, likable, etc., for the body conducting proceedings was appointed (this problem arose especially with prosecutors).[40] This, of course, raised the question of whether the quality of assistance rendered by the state legal aid counsels met the standard determined by the ECtHR, as the aim of counsel in criminal proceedings is to assist the accused and not to please the body conducting proceedings. To avoid this kind of problems, legal aid counsels are now appointed by the Bar Association. State Legal Aid Act [41] (SLAA) § 18 (2) very clearly provides that the body conducting proceedings has no right to appoint counsel anymore. While on the one hand this ensures that the body conducting proceedings cannot appoint an advocate who will make its job easy, it also leaves no possibility for the courts to exclude advocates who are known to provide ineffective assistance, which is the main shortcoming of the new system, together with problems related to funding of the system thoroughly described below.[42]

The provision of state legal aid is regulated by the SLAA. Appointed defence in criminal proceedings is one category of state legal aid (SLAA § 4 (3) 1)). It should be noted that although the ECtHR requires two conditions to be met – financial and legal one – for a person to qualify for the right to free legal aid,[43] the grounds for provision of legal aid by the state are broader in the CCP than required by the ECtHR case law. Namely, there is no consideration of the financial situation of an accused; rather, counsel is appointed either to any accused person who has not chosen counsel but has requested the appointment of counsel, or to one who has not requested counsel in a case where the participation of counsel is mandatory (CCP § 43 (1) 1) and 2); SLAA § 6 (2)). The latter means that counsel is appointed to the accused even if he wishes to defend himself.[44] Nevertheless, here the state acts based on the presumption that the interests of justice require the appointment of counsel. Only when a person wants to submit a petition for review,[45] in order to receive state legal aid this person has to be unable to pay for competent legal services due to his financial situation at the time that the person is in need of legal aid, if he is able to pay for legal services only partially or in instalments, or if the financial situation of this person does not allow meeting basic subsistence needs after paying for legal services (SLAA § 6 (1) and (5)). There is no reason to believe that this condition is discriminative towards people who want to file a review compared to so-called ordinary accused persons, as the petition procedure is not a criminal proceeding in its classical meaning due to the fact that then the court decision is already in force.

Since in Estonia a person's financial situation is irrelevant to his right to use the assistance of legal aid counsel in criminal proceedings, it is reasonable that upon conviction the person assumes the obligation to reimburse the costs of legal aid, from which he can be partially released only if his financial situation does not allow him to perform this obligation. Subsection § 180 (1) of the CCP provides that in case of conviction procedural expenses, which under § 175 (1) 4) of the CCP include remuneration for appointed counsel, are compensated by the convicted person. Pursuant to the first sentence of § 180 (3) of the CCP, when determining procedural expenses, the court has to take into account the financial situation and chances of re-socialisation of the convicted person. Pursuant to the second sentence of the same subsection, the court orders a part

[40] Estonian Ministry of Justice, Availability and Quality of Appointed Counsel in Criminal Proceedings, available only in Estonian <http://www.kriminaalpoliitika.ee/et/maaratud-kaitsja-kattesaadavus-ja-kvaliteet-kriminaalmenetluses> accessed 12 October 2016

[41] State Legal Aid Act, passed 28 June 2004, entered into force 1 March 2005, last amended 1 August 2016 – RT I, 22.06.2016, 27

[42] Anneli Soo, 'An Individual's Right to the Effective Assistance of Counsel Versus the Independence of Counsel: What Can the Estonian Courts Do in Case of Ineffective Assistance of Counsel in Criminal Proceedings?') (2010) 16 Juridica International 252, p 253

[43] *Artico v Italy* App no 6694/74 (ECtHR, 13 May 1980) p 34

[44] See grounds for mandatory participation in paragraph 1.2 above.

[45] According to CCP § 365 (1) 'review procedure' means hearing of a petition for review by the SCE in order to decide on the resumption of proceedings in a criminal matter in which the court decision has entered into force.

of the expenses to be borne by the state if the convicted person is obviously unable to reimburse the procedural expenses. According to the judicial practice of the SCE, the court is not allowed to order all expenses to be borne by the state,[46] which means that the convicted person always has to reimburse a part of procedural expenses, even if it is just a small part. No one from Estonia has ever turned to the ECtHR to challenge this standpoint based on an argument that he does not have sufficient means to cover the legal aid costs after conviction. The matter itself is still unsolved in the case law of the ECtHR as it is not clear whether it is allowed for the state to require the accused upon conviction to pay the costs of state legal aid even if during the time legal aid was granted for him the state established that he was without sufficient means to hire counsel.[47] Therefore, until the ECtHR has not given a clear standpoint, Estonian courts are justified to continue with this practice and order procedural costs to be compensated even if a convicted person is in fact able to show that he did not have financial resources to hire counsel at the time counsel was appointed to him. Of course, in case of acquittal, procedural expenses are compensated by the state (§ 181 (1) of the CCP).

In practice, the appointment of counsel functions in the following way. The body conducting proceedings files a request to the Estonian Bar. The Estonian Bar enters the request into the electronic system of state legal aid (RIS), where advocates who are interested in providing state legal aid have registered themselves. The request is sent to all advocates who have been given consent to provide legal aid in a certain region of Estonia, and whoever acts quickest receives the task. In principle, when the advocate has given his consent to act as defence counsel in a certain case, he has to act as one until the final decision is made in the criminal proceedings (as the Estonian court system comprises of three instances, it can happen that the final decision is made at the SCE). The advocate is rarely appointed against his will – this could be done only if no one has accepted the request in RIS. In spite of that, some grounds for the change of a state legal aid provider do exist. First, according to SLAA § 20 (1) upon agreement of an advocate providing state legal aid and the recipient of state legal aid, legal services in the given matter may be provided to the person by another advocate, who grants his consent for the transfer of the obligation to provide state legal aid to him. This is, however, rarely allowed by the Bar Association as the Association does not want to promote the idea that the change of appointed counsel is an uncomplicated procedure: this may cause a number of problems as the accused persons who need state legal aid are often contradictory and difficult clients, who are too eager to change their counsel if they have an opportunity to do so. Secondly, there might also be cases in which a state legal aid advocate has been excluded from the Bar Association, disbarred or suspended from professional activities, has died or has a long-term illness. In such events, the Bar Association organises the appointment of a new provider of state legal aid (SLAA § 20 (3)). Thirdly, the advocate may also refuse to render legal aid services if the instructions of the accused are illegal (SLAA § 19 (1)) or if a conflict of interest arises (SLAA § 19 (2)).

All Estonian advocates, including the ones that render legal aid, have to follow the Code of Conduct of the Estonian Bar Association. According to the Code of Conduct § 4 (1), when rendering legal services, an advocate is obliged to observe the law, legal acts and the decisions of the Bar authorities, rules of professional conduct, as well as good practices and his conscience. The whole § 4 of the Code emphasises the independence of the profession, which is a principle also recognised by the ECtHR.[48] The Code of Conduct provides a number of rules that an advocate has to follow when communicating with his clients, the most important of which are mentioned here. First, an advocate must always act in the best interest of his client and must put those interests before his own interests or those of third parties (the Code of Conduct § 8 (1)). Second, an advocate is not allowed to accept an assignment unless he can discharge those instructions promptly, taking into account the pressure of other work, nor handle a matter, which he knows he is not competent to handle in the best interests of the client (the Code of Conduct § 12 (4)). Third, legal services rendered by the advocate must be professional and based on the investigation of underlying circumstances, evidence, legal acts and court practice (the Code of Conduct § 14 (2)). Therefore, it is established by several clauses of the Code of Conduct of the Estonian Bar Association that advocates have to act in the best interests of the accused and, in general, they are only bound by the law and ethics, which is how the independence of the Bar should be understood in the context of the Estonian legal system. As it was discussed above, in criminal proceedings an advocate does not have to follow the instructions of his client if these instructions are not in the interest of his client. Additionally, he is not obliged to follow the instructions of his client if these instructions are contrary to law (the Code of Conduct § 8 (2)). There are quite a few special rules for the advocates acting as counsels in criminal proceedings in the Code of Conduct. The most important of these rules has already been mentioned above, stating that if the client denies the accusations made against him the position of the client is binding for the advocate (the Code of Conduct § 19 (3)). As there is a lack of guidelines in the Code of Conduct for the advocates acting as defence counsels, the rest is up to the CCP and the conscience of the advocate to determine. In addition, the Estonian Bar Association has issued guidelines for the state legal aid counsels on how to act in criminal proceedings.[49] These guidelines are for internal use only and, therefore, not public, but contain a number of important obligations that the state legal aid counsel has in criminal proceedings: e.g., the obligation to know the facts of the case and the relevant law (basically repeating what the CCP provides); inform the accused about his rights and what he is accused of; consult with the accused, etc. In addition to instructing the advocates

[46] Court Ruling of the Criminal Chamber of the Supreme Court, 16 September 2010, court case no 3-1-1-76-10, p 8

[47] Harris, O'Boyle & Warrick *'Law of the European Convention on Human Rights'* (3rd edn, Oxford University Press 2014) p 479

[48] *Daud v Portugal* App no 22600/93 (ECtHR, 21 April 1998) p 40

[49] Guidelines for providing state legal aid in criminal proceedings *(Kriminaalmenetluses kaitsjana riigi õigusabi osutamise juhend)* adopted on 25 November 2014 by the Board of the Estonian Bar Association

who want to participate in criminal proceedings as counsels, these guidelines also serve as grounds for disciplinary actions in case a complaint is filed with the Estonian Bar Association concerning the poor performance of a defence counsel.

2.2. Problems related to the existing system

According to the Bar Association Act[50] § 64[1] (1), the organisation and provision of state legal aid is the responsibility of the Estonian Bar Association. Fees paid to advocates for providing state legal aid are approximately 2-3 times lower than average market prices.[51] In an opinion of the Estonian Ministry of Justice, it is the obligation of every member of the Bar to provide state legal aid at least in some amount in return for advantages that the state has given to the Bar members on the market. For instance, only members of the Bar have a right to use the title 'advocate,' since other people who want to provide legal aid are called just 'lawyers'. In addition, the organisation and operation of the Bar is legally regulated (including: the requirements a person has to meet and the exam he has to pass in order to become an advocate; the organisation of training for advocates; supervising the professional activities of the members of the Bar and their compliance with the requirements for professional ethics; professional liability insurance), which gives advocates a certain degree of credibility and a reputation much higher than the so-called lawyers have in society. This in turn gives advocates an opportunity to sell their services more easily and at higher prices. In addition, there are some advantages for advocates provided by the Estonian procedural codes.[52] Some of these exceptions are stipulated in the CCP for advocates as defence counsels. First, the advocate does not need the permission of the body conducting proceedings to participate in criminal proceedings as retained counsel. Second, if the accused wants to file an appeal in cassation or a petition for review he can do it only through an advocate.[53] Therefore, if the accused has a non-advocate as retained counsel in the previous stages of the court proceedings, he has to change him against an advocate if he wants to file an appeal in cassation or a petition for review. The ECtHR considers it permissible for the special rules to limit the accused persons' choice of lawyers to the members of the bar when appealing to higher courts.[54]

Although the state has no plan to open the market of state legal aid to non-advocates, from time to time lawyers who do not belong to the Bar have expressed their opinion that some of them would be willing to provide state legal aid even with the fee as low as it is today. One of the reasons for it might be that most lawyers who do not belong to the Bar do not earn as much as advocates offering private legal aid, so the difference between the state legal aid fee and their common market fee is not so dramatic. Although it might be an idea to consider, the author of this article sees at least three problems related to it. First, non-advocates have not passed the Bar exam, so their knowledge and skills in the field of criminal law have not been verified. This, as it was already mentioned, is the main reason they need to ask permission from the body conducting proceedings for acting as retained defence counsel in proceedings. Second, as they do not belong to the Bar, the Code of Ethics does not regulate their acts in proceedings. Of course, they still have to comply with the rules of the CCP and a number of commonly recognised ethical rules as it was discussed above, but still their action is much less regulated than that of the advocates. Third, they do not face disciplinary responsibility when they fail to fulfil their duties as counsel. This means that not only are they not sanctioned in these cases, but also their reputation remains untouched, as their failures are not made public by a disciplinary decision. Throughout the whole criminal proceeding, it has to be considered that advocates are members of the Bar Association. For instance, if the party to the court proceeding has requested for the removal of an advocate-counsel, the judge has to notify the Board of the Bar Association of the scheduled time for a proceeding for removal. The court has to notify the Board of the Bar Association also if counsel fails to present a statement of defence on time, if counsel fails to appear in a court session, if counsel appears at the court session, but is not familiar with the criminal matter or violates an order in the court room.[55] On the one hand, the notification is necessary for the Board of the Bar Association to decide about the commencement of disciplinary action. On the other hand, the fact that the law gives the court an obligation to inform the Bar about an advocate's failure to fulfil his duties disciplines advocates. Therefore, the existing system seems to be much safer for accused persons and more easily operable than the one in which non-advocates would provide state legal aid in addition to the advocates.

However, the main problem related to the existing system today does not concern the question 'who should provide legal aid?' but 'how to balance the quality of the system and the resources spent on the system?' Provision of state legal aid is financed from funds allocated from the state budget (SLAA § 30 (1)). The ECtHR has also confirmed that the obligation to grant free legal assistance lies on the state that may delegate the duty to operate the system to the local Bar Association.

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[50] Bar Association Act (*Advokatuuriseadus*), passed 21 March 2001, entered into force 19 April 2001, last amended 1 August 2016 – RT I, 22.06.2016, 23

[51] An hourly fee rate for state legal aid is at the moment usually 40 euros while private legal aid costs approx. 100-120 for an hour.

[52] The decree of the Ministry of Justice to the Estonian Bar Association, 11 Aug 2014

[53] CCP § 344 and § 367.

[54] *Meftah and Others v. France* App nos 32911/96, 35237/97 and 34595/97 (ECtHR, 26 July 2002)

[55] CCP § 56, § 227, § 267, § 270, § 273.

However, the ultimate responsibility for the functioning of the system is still on the state.[56] Two years ago a dispute started between the state and the Bar Association about whether the state has to raise the funding by the request of the Bar Association if the latter shows that it does not have sufficient means to pay competitive fees for the state legal aid counsels. The problem was that at that time the bases for calculating state legal aid provision fees, the procedure for the payment and the amount of such fees, and the extent of and procedure for compensation for the state legal aid costs were established by the Board of the Bar Association (SLAA § 21 (3)). Although today the Minister of Justice has to establish these bases as the law has changed (the reason for it will be explained below), in principle the system itself has not changed much. The Bar Association organises the payment of the state legal aid fee and state legal aid costs to an advocate who has provided state legal aid. An advocate is not allowed to request remuneration from a person being defended (SLAA § 24 (1) and (2)). In short, the payment of state legal aid fees to advocates functions like this: an advocate submits an application for compensation to the body conducting proceedings; the body conducting proceedings determines the amount of state legal aid fee and the extent of compensation for state legal aid costs; the court decision or an order of an investigative body or a Prosecutor's Office is sent to the Bar Association, and the payment is organised by the Bar Association.[57] A person to whom legal services have been provided has nothing to do with this procedure, and he has to compensate the state legal aid fee and state legal aid costs pursuant to the procedure prescribed in the CCP (SLAA § 25 (4)). As the funding itself has always come from the state budget, the actions of the Bar Association on establishing the exact fees for state legal aid were limited by the amount of finances given by the state. This means that even if the Bar Association observed that the fees it had established were considerably low compared to market prices (as it was already mentioned above, in Estonia the state legal aid fees are around half or one third of the average market price), it could not raise the fees unless the state raised the funding. The dispute between the Bar and the state mentioned above started when the Bar Association acted against this principle and raised the fees even though the state funding was not raised. This caused a lack of resources and the aforementioned dispute between the government and the Bar Association at administrative courts of Estonia.[58] The state, however, was of the position that the fees paid to advocates for providing state legal aid do not have to compete with the fees of the private market since the advocates have a duty to contribute to the state legal aid system in return for the advantages the state has given to the Bar. The state also argued that it is the obligation of every advocate (not only of the ones who have agreed themselves) to provide state legal aid, even pro bono if necessary. If an advocate is not willing to do that, he has the opportunity to leave the Bar.[59]

On 26 April 2016, the SCE en banc declared the situation in which the Bar has to establish the legal aid fees to its members unconstitutional, as such a mandate belongs constitutionally only to the Government.[60] As was stated above, now the law has changed and it is the Minister of Justice that establishes the bases for legal aid fees. However, this has not changed the fees, as the common hourly rate for providing legal aid is still 40 euros.

The dispute between the state and the Bar indicates an existential crisis that the state legal aid system is facing. According to estimations of the Bar, only 12.5% of its members provide state legal aid (approx. 100 advocates).[61] No signs indicate that these numbers will grow in future. At the same time, in 2014 nearly 14 000 people needed state legal aid (75% in criminal cases).[62] This means that advocates providing state legal aid are overburdened and, therefore, often ineffective. It can be easily assumed that until the fees are not raised, nothing will change in the system. Nevertheless, the state refuses to admit it, suggesting even that advocates should provide state legal aid *pro bono*, which in turn causes reluctance among advocates. Yet, as the final responsibility for operating the state legal aid system lies on the state, it should be a task of the state to motivate the members of the Bar to provide state legal aid effectively.[63]

3. How is the principle of continuous representation limited by removal of counsel from criminal proceedings?

In general, it is preferred that one counsel defends the accused throughout the whole proceeding. This gives the accused the best opportunity to defend his rights and interests, as counsel is well informed about the development of the case and, therefore, can build adequate defence tactics. The CCP supports this standpoint by stating that once appointed counsel has

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[56] *Van der Mussele v Belgium* App no 8919/80 (ECtHR, 23 November 1983) p 29; Anneli Soo,'How to Ensure Effecive Legal Assistance by the State in Criminal Proceedings?' *(Kuidas tagada efekttivne riigi õigusabi kriminaalmenetluses)* (2014) 9 Juridica 700, p 705

[57] SLAA §§ 21-24.

[58] Overview of the case is unfortunately only available in Estonian: <https://advokatuur.ee/est/uudised.n/advokatuur-jatkab-riigi-oigusabi-rahastamise-kohtuvaidlust-ringkonnakohtus> accessed 12 October 2016

[59] The decree of the Ministry of Justice to the Estonian Bar Association, 11 Aug 2014

[60] Judgment of the Supreme Court *en banc*, 26 April 2016, court case no 3-1-1-40-15

[61] Mailis Meier *'Role of the Estonian Bar Association in Providing State Legal Aid in Criminal Proceedings'* (Eesti Advokatuuri roll riigi õigusabi pakkumises kriminaalmenetluses) (Research Paper, Tartu 2015), p 7

[62] <https://advokatuur.ee/est/uudised.n/advokatuur-esitas-justiitsministeeriumile-ettepanekud-riigi-oigusabi-susteemi-reformimiseks> accessed 12 October 2016

[63] Anneli Soo,'How to Ensure Effective Legal Assistance by the State in Criminal Proceedings?' *(Kuidas tagada efekttivne riigi õigusabi kriminaalmenetluses)* (2014) 9 Juridica 700, p 709

agreed to take the case, he has to participate in criminal proceedings up to the SCE, if necessary. For retained counsel, the situation depends on his agreement with the accused. Courts cannot intrude in the principle of continuous representation and remove counsels from the proceedings without compelling reasons. Estonian CCP names three grounds for the court that removes counsel to override the accused's wish (or interest) to continue with the same counsel.

First, the court has to remove counsel if a conflict of interests arises. More specifically, a person is not allowed to act as counsel if he is or has been a subject to criminal proceedings on another basis in the same criminal matter; or if in the same or related criminal matter he is defending or representing or has previously defended or represented another person whose interests are in conflict with the interests of the accused (CCP § 54 clauses 1)-2)). As the state and, therefore, the bodies conducting proceedings, including the courts, have a duty to guarantee the accused person's right to defence (CCP § 8 clause 2)), it can be concluded that in case of conflict of interest, the court should remove counsel from the proceedings even if the accused insists that counsel continues to represent him, because here the interests of justice outweigh the accused person's wishes. Consequently, the right to defence is not only a matter between the accused and counsel, but also serves the right to fair trial and society's expectation that the procedural rights are guaranteed in criminal proceedings.[64] Subsection § 55 (1) of the CCP, which provides procedural rules for removal of counsel in cases of conflict of interest, takes this into account and does not require the consent of the accused. It is highly probable that counsel is not able to represent conflicting interests equally effectively.[65]

Second, the court removes counsel if it becomes evident that counsel has abused his status in the proceedings by communicating with the person being defended, after the person has been detained as a suspect or arrested, in a manner which may promote the commission of another criminal offence or violation of the internal procedure rules of the custodial institution (CCP, § 55 (2)). As this basis for removal is hardly ever used in Estonia, it will not be further discussed here.

Third, if the basis provided for in § 20 (3^1) of the SLAA exists, the court removes counsel by a ruling on its own initiative or at the request of a party to the court proceeding (CCP, § 55 (1)). According to the first sentence of § 20 (3^1) of the SLAA, at the request of the accused or on its own initiative, the court removes an advocate from the provision of state legal aid by a ruling if the advocate has shown himself to be incompetent or negligent.

In Estonia before the 1 January 2009, the courts had very limited competence in removing ineffective (incompetent, negligent, etc.) counsel: they were only allowed to remove counsel if conflicts of interest arose and if counsel abused his procedural status in the proceedings. Today § 20 (3^1) of the SLAA together with § 55 (1) of the CCP enables the court, at the request of the accused or on its own initiative, to remove an advocate from the provision of state legal aid if the advocate has shown himself to be incompetent or negligent. What 'incompetent' or 'negligent' means is provided for neither in the SLAA nor in the CCP. This means that today courts' conclusion that counsel was 'incompetent' or 'negligent' is a result of a case-by-case analysis. From the case law of ECtHR, it could be concluded that the state is liable for violation of the right to counsel at least in cases in which counsel fails to act[66] or fails to comply with 'formal' but crucial procedural requirements.[67] However, so far the applicants who have claimed counsels' professional errors in presenting the their case have not been successful in the ECtHR.[68] The SCE held in its controversial decision that it cannot assess an appointed counsel's tactical choices and condemn a counsel's decision not to request an expert assessment before the prosecutor filed charges.[69] The court also added that if the accused is not satisfied with the assistance provided by his appointed counsel, he has the opportunity to choose retained counsel.[70] The last argument has to be objected, as an indigent accused is not able to do that due to his financial condition. As in Estonia the financial condition does not matter as it was discussed above, it can happen that counsel is appointed to a person who can actually afford to hire one, but has not done it on time. Nevertheless, it is a rare occasion and usually indigent accused persons receive state legal aid. Therefore, the standpoint of the SCE is not only illogical, but is also contrary to the finding of the ECtHR that it is the responsibility of the state to guarantee practical and effective rights. In court case no 3-1-1-70-10, the accused requested removal of appointed counsel, claiming that there has been a breakdown in the attorney-client relationship. The SCE concluded that there was no violation of the right to defence, because the case had already reached appellate proceedings and changing appointed counsel so late was not practical.[71] Although the SCE did not say it out loud, it could be derived from its judgment that when there is a breakdown of the attorney-client relationship, courts still have to consider and weigh different values (e.g. practicality and efficiency) before they decide whether to remove counsel or not. Yet, that way the accused person's right to counsel might be violated, as an

[64] Court Ruling of the Criminal Chamber of the Supreme Court, 29 January 2002, court case no 3-1-1-3-02, pp 7.2. and 7.3

[65] Even if counsel claims that the conflict does not affect his or her performance, he should be still removed in order to guarantee that the accused receives adequate and unbiased assistance, because another interest may either influence counsel subconsciously or, even if he thinks that at some specific point of the proceedings it does not affect him, it may start to have an effect on him afterwards.

[66] *Artico v Italy* App no 6694/74 (ECtHR, 13 May 1980)

[67] *Kamasinski v Austria* App no 9783/82 (ECtHR, 19 December 1989), *Czekalla v Portugal* App no 38830/97) (ECtHR, 10 October 2002),

[68] Harris, O'Boyle & Warrick *'Law of the European Convention on Human Rights'* (3rd edn, Oxford University Press 2014) p 481-482

[69] Judgment of the Criminal Chamber of the Supreme Court, 21 December 1999, court case no 3-1-1-115-99, p 4

[70] P 4 of the judgment.

[71] Judgment of the Criminal Chamber of the Supreme Court, 15 November 2010, court case no 3-1-1-70-10, p 24

obligation to guarantee such a right does not depend on practical considerations. The ECtHR's aforementioned standpoint that the rights that are guaranteed to the accused must not be theoretical or illusory but practical and effective allows us to conclude that courts should guarantee the right to counsel at any point of the court proceedings.

Subsection 20 (3^1) of the SLAA entered into force in afore cited wording on 1 January 2010. Before that amendment § 20 (3^1), which was in force since 1 January 2009, required the consent of the accused if the court was planning to remove counsel. Today, as it is obvious from the wording of § 20 (3^1), no consent of the accused is needed, and the court is allowed to remove incompetent or negligent appointed counsel without consulting the accused and even if the accused is against it. This is consistent with the ECtHR case law limiting the accused person's choice of counsel if the interests of justice so require. The ECtHR has described the state's obligation to intervene if 'a failure by legal aid counsel to provide effective representation is manifest or sufficiently brought to their attention in some other way.'[72]

On 1 September 2011, § 267 (4^1) of the CCP entered into force. According to this subsection, a court may withdraw counsel from a procedure if the person is not capable of acting in court properly or has shown himself to be dishonest, incompetent or irresponsible in the court proceedings or if he has maliciously impeded the correct and speedy hearing of the criminal matter or has failed to comply with the order of a judge repeatedly. After withdrawal of counsel, the court immediately proposes the accused to choose another counsel within the term granted by the court (CCP, § 267 (4^2)). It is not clear what this "withdrawal" is. Formally it is not a basis for removal, because it has not been provided for in § 55 of the CCP, where all other bases for removal are. Not a word has been mentioned about this opportunity to withdraw counsel in the initial explanatory memorandum of the CCP or in the additional memorandum.[73] And last but not least, the heading of section 267 is "Measures applicable to persons who violate order in a court session". Therefore, although the formulation of § 267 (4^1) of the CCP seems to indicate that it enables the court to disqualify counsel from the proceedings indefinitely, the abovementioned arguments overturn this conclusion, which in turn means that this may be a temporary measure. Yet, as the court proposes the accused to choose another counsel after initial counsel is withdrawn, it could be claimed that it still is a permanent removal of counsel from the proceedings. Therefore, it can be assumed that criminal courts in Estonia may remove not only state legal aid counsels but also retained counsels (even an advocate counsel) from the proceedings if ineffectiveness of counsel arises. And what is more, courts may do that even without consent of the accused. The same principle could in fact be detected from the case law of the ECtHR, as the Court has concluded that it is the state's obligation to guarantee the right to counsel not only in state legal aid cases but also in case the accused has retained counsel.[74] Similar problems are related to the pre-trial situation, in which counsel has failed to compose the statement of defence on time. The law determines that in that case the court obliges the accused to choose new counsel or asks the Bar Association to appoint substitute counsel to the accused (CCP, § 227 (5)). Although according to the law it is obligatory for the court to act that way, it might not be in accordance to the accused person's right to choose one's counsel as well as with the aim to save resources if the impediment to compose the statement of defence was temporary for the previous counsel.

Ineffectiveness of counsel may bring other consequences than removal of counsel from the proceedings. For instance, the court session may be adjourned, the court may give additional time for counsel to prepare, make remarks to counsel, send notification to the Bar, etc. According to former Estonian judicial practice, if counsel failed to file a notice of appeal or the appeal itself to the higher court, the accused lost the opportunity to appeal, unless there was grounds for restoration of the term of appeal, which according to judicial practice of the SCE is objective impediment, for instance, a natural disaster, traffic accident, illness of counsel, etc.[75] The situation has changed due to the judgment of ECtHR in case *Andreyev v Estonia*[76], where the ECtHR held violation of Article 6 (1) of the European Convention on Human Rights, due to the fact that the accused missed his opportunity to access the higher court (the SCE), because his appointed counsel did not file an appeal on time. The standpoint of the ECtHR was that in cases like that, the accused should be given a chance to file a new appeal through another, this time effective counsel, which the SCE has done lately in cases no. 3-1-2-2-12 and 3-1-2-3-13.[77] However, it is not clear from the wording of the judgment of the ECtHR whether this standpoint also applies to retained counsels. Taking into account the findings of the *Goddi v Italy*, it could be argued that it does, although the SCE has so far given a new opportunity to appeal only to accused persons who have had state legal aid counsels. As so far no accused person has turned to the SCE claiming that his retained counsel failed to file an appeal, so there is no relevant court practice concerning the matter.

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[72] *Kamasinski v Austria* App no 9783/82 (ECtHR, 19 December 1989) p 65

[73] Explanatory Memorandum to the Act to Amend the Code of the Criminal Procedure and Other Related Acts, 599 SE, 11th Riigikogu

[74] *Goddi v Italy* App no 8966/80 (ECtHR, 8 April1984)

[75] Court Ruling of the Criminal Chamber of the Supreme Court, 12 February 2007, court case no 3-1-1-5-07, p 6.

[76] *Andreyev v. Estonia* App no 48132/07 (ECtHR, 22 November 2011)

[77] Court Ruling of the Criminal Chamber of the Supreme Court, 9 May 2012, court case no 3-1-1-2-2-12, Court Ruling of the Criminal Chamber of the Supreme Court, 14 March 2013, court case no 3-1-2-3-13

Conclusion

In Estonia, there are two grounds for defence counsel to participate in criminal proceedings: they are either retained or provide state legal aid. Retained counsel could be every person that meets educational requirements and is allowed into proceedings by an investigator, prosecutor or court, unless counsel is a member of the Estonian Bar Association, in which case he does not need the consent of authorities. Initially given consent is withdrawable if an investigator, a prosecutor or the court determines that a non-advocate lacks knowledge in Estonian (criminal) law or criminal procedure. State legal aid, however, is only provided by advocates, and members of the Bar who have taken an exam to attain membership. The right to state legal aid does not depend on the financial condition of the accused as it is guaranteed for every accused person who wishes counsel to participate and has not chosen one himself. The authorities also appoint counsel if the accused has not chosen one and participation is mandatory according to the law.

The system of appointment of counsels is operated in Estonia by the Bar. This means that the request for appointment of counsel is sent by the investigative body, the Prosecutor's Office or the court to the Bar, who appoints counsel among its members who have given their consent to provide legal aid. Therefore, the investigative body, the Prosecutor's Office or the court cannot appoint counsel that is convenient for them. Nevertheless, this also means that due to the fact that the Bar runs the legal aid system, the state has taken a standpoint contradictory to the findings of the European Court of Human Rights that it is the sole responsibility of the Bar to guarantee the right to legal aid. Therefore, the Estonian government is of the opinion that the Bar should operate the system effectively even if it lacks resources to pay competitive fees to its members for providing legal aid. The dispute between the state and the Bar found its solution in the judgment of the Supreme Court of Estonia judgment, according to which it is in the competence of the Government not of the Bar to establish the fees for state legal aid. However, this did not change the fees, which are still much lower than the market fees for providing legal services. This is a problem underestimated by the Estonian Government, although low fees make the provision of legal aid unattractive among the advocates, and negatively influence the quality of legal aid.

The Estonian Code of Criminal Procedure regulates the participation of defence counsel in criminal proceedings. The Code defines a counsel's rights and duties in criminal procedure, and grounds for removal of counsel by the court. Counsels who are members of the Bar Association also have to consider the rules defined by the Code of Conduct of the Estonian Bar Association. The activities of non-advocates are directly regulated only by the Code of Criminal Procedure, but some general duties could be derived from legislative acts of the Estonian Bar Association. The main grounds for removal of counsels are conflict of interests and ineffectiveness. While the first is rather clear, the second needs to be specified by the court practice. First, there is no clear understanding of what constitutes ineffectiveness (also named negligence, incompetence) of defence counsel, as it seems to be a matter of case-by-case analysis. Second, it is grounds for removal for appointed counsels, but the law is ambiguous when it comes to retained counsels, as it could also be claimed that for retained counsels this is just a temporary measure.

Generally, it could be concluded that the Estonian system of participation of defence counsels in criminal proceedings meets the criteria set by the ECtHR. First, as the financial condition does not exist for state legal aid, Estonia provides legal aid even on wider grounds than those required by the ECtHR. Second, limitations to persons who are allowed to participate in criminal proceedings as counsels (e.g., legal education for retained counsel; membership of the Bar in the area of state legal aid) consider both the interest of the accused and of justice. Third, when it comes to removal of counsel due to the conflict of interests or counsel's ineffectiveness or incompetence, the consent of the accused is not required, as it is the obligation of the state to guarantee the right to counsel to be practical and effective, not theoretical and illusory. The main problem the Estonian system of defence counsels faces is a lack of resources for fees of appointed counsels. This, however, is primarily a matter of state policy, not law.